

Juanita R. Brooks (CA SBN 75934) / brooks@fr.com
Roger A. Denning (CA SBN 228998) / denning@fr.com
Frank J. Albert (CA SBN 247741) / albert@fr.com
Jared A. Smith (CA SBN 306576) / jasmith@fr.com
Tyler R. Train (CA SBN 318998) / train@fr.com
Elliot N. Scher (CA SBN 343705) / scher@fr.com
FISH & RICHARDSON P.C.
12860 El Camino Real, Suite 400
San Diego, CA 92130
Telephone: (858) 678-5070 / Fax: (858) 678-5099

Susan E. Morrison (*Pro Hac Vice*) / morrison@fr.com
FISH & RICHARDSON P.C.
222 Delaware Avenue, 17th Floor
P.O. Box 1114
Wilmington, DE 19801
Telephone: (302) 652-5070 / Fax: (302) 652-0607
Additional counsel listed on signature page

Attorneys for Plaintiff,
FINIAN LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

FINJAN LLC,

Case No. 3:14-cv-04908-RS

Plaintiff,

**FINJAN LLC'S OPPOSITION TO PALO
ALTO NETWORKS, INC.'S MOTION TO
EXCLUDE TESTIMONY OF DRS.
ANGELOS KEROMYTIS AND ROBERT
MANESS**

PALO ALTO NETWORKS, INC.,

Date: November 14, 2024
Time: 1:30 P.M.
Hon. Richard Seeborg
Ctrm. 3, 17th Floor

REDACTED VERSION

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. LEGAL STANDARD.....	2
III. DR. KEROMYTIS OFFERS QUALIFIED, RELIABLE OPINIONS.....	3
A. Dr. Keromytis Is Qualified to Offer the Opinions in His Report, And Dr. Maness Properly Relies Upon Them	3
1. Dr. Keromytis offers qualified, supported opinions	4
2. Dr. Maness properly relies on Dr. Keromytis's opinions	5
B. Dr. Keromytis Applies a Reliable Apportionment Methodology	7
1. Dr. Keromytis's feature analysis is unquestionably detailed and sufficient	7
2. Dr. Keromytis's weighting methodology is reliable	7
a. Courts have approved of attributing equal weights to a multi-feature product.....	8
b. Dr. Keromytis provides reasonable adjustments to certain product features	9
IV. DR. MANESS OFFERS RELIABLE DAMAGES OPINIONS	11
A. Dr. Maness's Royalty Base Opinions Are Admissible	11
1. Dr. Maness provides a reliable apportionment analysis that properly apportions patented from unpatented features in the accused products.....	11
a. The law requires an apportionment analysis to focus on patented and unpatented features	12
b. Dr. Maness properly excludes unpatented features from his royalty base	14
i. The law does not require apportioning the value of "conventional" from "unconventional" patented features	14
ii. PAN fails to support its contention that the accused hardware products are entirely "conventional" and should be excluded.....	15
2. The dismissal of the '154 Patent does not undermine Dr. Maness's opinions.....	17

1	B. Dr. Maness Properly Analyzes the <i>Georgia-Pacific</i> Factors and	
2	Finjan Licenses in Support of His Royalty Rate Opinions	18
3	1. Dr. Maness's <i>Georgia-Pacific</i> factor analysis follows	
4	Federal Circuit's and this Court's case law.....	19
5	2. Dr. Maness Has Analyzed Finjan's Past License	
6	Agreements and Shows They Are Technologically and	
7	Economically Comparable	22
8	V. CONCLUSION.....	25
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

		Page(s)
2		
3	Cases	
4	<i>ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.</i> , 694 F.3d 1312 (Fed. Cir. 2012).....	23
5		
6	<i>Commonwealth Sci. & Indus. Rsch. Organisation v. Cisco Sys., Inc.</i> , 809 F.3d 1295 (Fed. Cir. 2015).....	12, 14
7		
8	<i>DataQuill Ltd. v. High Tech Comput. Corp.</i> , 887 F. Supp. 2d 999, 1023–24 (S.D. Cal. 2011).....	24, 25
9		
10	<i>Daubert v. Merrell Dow Pharmas., Inc.</i> , 509 U.S. 579 (1993).....	2, 3
11		
12	<i>Ericsson, Inc. v. D-Link Sys., Inc.</i> , 773 F.3d 1201 (Fed. Cir. 2014).....	23
13		
14	<i>Finjan LLC v. SonicWall, Inc.</i> , 84 F.4th 963 (Fed. Cir. 2023).....	6
15		
16	<i>Finjan, Inc. v. Blue Coat Sys., Inc.</i> , 879 F.3d 1299 (Fed. Cir. 2018).....	<i>passim</i>
17		
18	<i>Finjan, Inc. v. Cisco Sys. Inc.</i> , No. 17-CV-00072-BLF, 2020 WL 13180005 (N.D. Cal. Apr. 21, 2020).....	<i>passim</i>
19		
20	<i>Finjan, Inc. v. Secure Computing Corp.</i> , 626 F.3d 1197 (Fed. Cir. 2010).....	<i>passim</i>
21		
22	<i>Finjan, Inc. v. Sophos, Inc.</i> , No. 14-CV-01197-WHO, 2016 WL 4268659 (N.D. Cal. Aug. 15, 2016).....	<i>passim</i>
23		
24	<i>i4i Ltd. P’ship v. Microsoft Corp.</i> , 598 F.3d 831 (Fed. Cir. 2010).....	19
25		
26	<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	2
27		
28	<i>Lucent Techs., Inc. v. Gateway, Inc.</i> , 580 F.3d 1301 (Fed. Cir. 2009).....	12, 16
29		
30	<i>MediaTek Inc. v. Freescale Semiconductor, Inc.</i> , No. 11-cv-5341-YGR, 2014 WL 2854890 (N.D. Cal. June 20, 2014).....	20, 21
31		
32	<i>NetFuel, Inc. v. Cisco Sys. Inc.</i> , No. 5:18-CV-02352-EJD, 2020 WL 1274985 (N.D. Cal. Mar. 17, 2020)	10, 11
33		

1	<i>Omega Pats., LLC v. CalAmp Corp.</i> , 13 F.4th 1361 (Fed. Cir. 2021).....	12, 15
2		
3	<i>Puff Corp. v. SHO Prod., LLC</i> , No. CV 22-2008-GW-KSx, 2024 WL 2208929 (C.D. Cal. Apr. 19, 2024)	13, 15
4		
5	<i>Realtime Data, LLC v. Oracle Am., Inc.</i> , No. 6:16-CV-88-RWS-JDL, 2017 WL 11574028 (E.D. Tex. Mar. 30, 2017)	9
6		
7	<i>Stragent, LLC v. Intel Corp.</i> , No. 6:11-CV-421, 2014 WL 1389304 (E.D. Tex. Mar. 6, 2014)	5, 9
8		
9	<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2011).....	22
10		
11	<i>Virnetx, Inc. v. Cisco Sys., Inc.</i> , 767 F.3d 1308 (Fed. Cir. 2014).....	<i>passim</i>
12		
13	Other Authorities	
14	<i>Fed. R. Evid. 702</i>	2, 3
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Finjan’s experts offer detailed and thorough analyses on damages issues—well beyond what
 3 this district and the Federal Circuit have previously required, and far from a case of “anything goes,”
 4 as PAN suggests in its Motion to Exclude (Dkt. 305) (“Mot.”). (Mot. at 1:14.) Guided by the body
 5 of past case law governing similar fact patterns, Finjan’s experts apportion between the patented
 6 and unpatented features of the infringing products and then apply a reasonable royalty rate. PAN
 7 offers no on-point authority to support the attacks it levies on Finjan’s experts. Each case that PAN
 8 cites contains critically distinguishable facts that render the cases unhelpful for resolving PAN’s
 9 Motion.

10 Finjan’s technical expert, Dr. Angelos Keromytis, performs a detailed feature analysis based
 11 on the specific facts of this case. In his report, Dr. Keromytis identifies 131 distinct features and
 12 sub-features within PAN’s accused products. (See Mot., Ex. 2 (Keromytis Rpt., App’x G).) He
 13 then categorizes these features down to four levels of sub-feature for PAN’s accused products and
 14 performs a well-reasoned weighting methodology for each feature. (See generally Mot., Ex. 1
 15 (Keromytis Rpt.) ¶¶ 489-504.) Dr. Keromytis begins at the top-level features and attributes weights
 16 to each that add up to 100%. (*Id.*) Some experts in past cases (including cases that PAN relies on)
 17 have stopped their analysis there without considering even a second level of sub-features. Dr.
 18 Keromytis repeats this process through four levels of sub-features, considering each level and sub-
 19 feature separately in attributing weighted values. (*Id.*) Where some experts assign equal weights
 20 across the board, Dr. Keromytis relies on documents, testimony, and his own experience in
 21 determining whether the features and sub-features in this case should be weighted equally or
 22 adjusted relative to other features at the same level. (*Id.*) PAN presents no legitimate challenge to
 23 Dr. Keromytis’s extensive technical analysis here. Contrary to PAN’s arguments, Dr. Keromytis
 24 does not opine outside of his expertise, and he certainly does not pluck his analysis from “thin air.”
 25 As discussed below, Dr. Keromytis provides a qualified, substantiated, and well-reasoned feature
 26 analysis for Finjan’s damages expert to rely on in his apportionment theory.

27 Finjan’s damages expert, Dr. Robert Maness, also presents reliable damages analyses for his
 28 opinions relating to a reasonable royalty base and rate. First, Dr. Maness performs an economic

1 analysis of the features of the accused products, based on Dr. Keromytis's technical feature analysis.
 2 (See generally Mot., Ex. 6 (Maness Rpt.) § V.B.) PAN's criticism of Dr. Maness's apportionment
 3 analysis—that he does not consider “conventional” components—is legally flawed for the same
 4 reasons as PAN's own damages theory. The law requires apportionment between patented and
 5 unpatented features. PAN argues, without legal support, for a second apportionment step that
 6 considers whether the patented features (despite being infringing features) are also “conventional”
 7 and, if so, excluding those patented, but purportedly conventional, features from the damages base
 8 as well. PAN cites no authority to support such a requirement, and Finjan has found none. Second,
 9 Dr. Maness provides a reasonable royalty rate opinion based on a thorough analysis of the widely-
 10 accepted *Georgia-Pacific* factors. (See generally Mot., Ex. 6 (Maness Rpt.) § VI.) Dr. Maness's
 11 resulting opinion that the parties would have agreed to rates of [REDACTED]
 12 [REDACTED] finds support through numerous past licenses. That PAN takes a different factual view of
 13 these licenses is not grounds for exclusion; PAN can raise its concerns on cross-examination.
 14 Finally, PAN criticizes Dr. Maness for relying on the very licenses that its own expert relies upon
 15 as purportedly not being “comparable.” As discussed below, these licenses [REDACTED]
 16 [REDACTED] are comparable to the facts of this case, both technologically and
 17 economically.

18 In short, PAN's challenges are generally flawed for two reasons. First, PAN's legal attacks
 19 misinterpret or disregard controlling authority and attempt to supplant it with plainly distinguishable
 20 case law. Second, PAN's factual attacks challenge the *weight* of Finjan's experts' testimony (not
 21 its admissibility), which is not for determination at this stage. For these reasons, as further discussed
 22 below, the Court should deny PAN's Motion.

23 **II. LEGAL STANDARD**

24 Under *Daubert*, the district court acts as a “gatekeeper” to ensure that expert testimony is
 25 relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *Kumho*
 26 *Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Federal Rule of Evidence 702 requires that
 27 “expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the
 28 jury in resolving a factual dispute.” *Daubert*, 509 U.S. at 591. “The focus [of a *Daubert* inquiry]

1 must be solely on principles and methodology, not on the conclusions that they generate.” *Daubert*,
 2 509 U.S. at 595. “So long as an expert’s methodology is sound and his opinions satisfy the
 3 requirements of Rule 702, underlying factual disputes and how much weight to accord the expert’s
 4 opinion are questions for the jury.” *Finjan, Inc. v. Cisco Sys. Inc.*, No. 17-CV-00072-BLF, 2020
 5 WL 13180005, at *1 (N.D. Cal. Apr. 21, 2020) (hereinafter “Cisco”) (citing *Micro Chem., Inc. v.*
 6 *Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003); *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir.
 7 2010)).

8 **III. DR. KEROMYTIS OFFERS QUALIFIED, RELIABLE OPINIONS**

9 **A. Dr. Keromytis Is Qualified to Offer the Opinions in His Report, And Dr. Maness 10 Properly Relies Upon Them**

11 Finjan presents its apportionment analysis through two expert reports. First, Finjan’s
 12 technical expert, Dr. Keromytis, identifies 131 features and sub-features for PAN’s accused products
 13 to which he individually attributes weighted values. (Mot., Ex. 1 (Keromytis Rpt.) ¶ 87 (“I have
 14 been asked to determine and assign weights to various features of the accused products according
 15 to their respective values to the overall products.”).) Dr. Keromytis summarizes this information in
 16 Appendix G to his report. (See Mot., Ex. 2 (Keromytis Rpt., App’x G).) This technical analysis
 17 represents the extent of Dr. Keromytis’s contribution to the apportionment analysis. (Mot., Ex. 1
 18 (Keromytis Rpt.) ¶ 87 (“I understand that the apportionment analysis requires additional economic
 19 analysis, for which I do not offer opinions. My opinions are limited to my technical analysis of
 20 assigning weights to patented and unpatented features of the accused products.”).)

21 Second, Finjan’s damages expert, Dr. Maness, supplies the economic component to the
 22 apportionment analysis. Dr. Maness takes the weighted product features from Dr. Keromytis and
 23 calculates a damages base by apportioning out the revenue attributable to the non-infringing
 24 features, as identified by Finjan’s technical experts. (Mot., Ex. 6 (Maness Rpt.) ¶ 15 (“I use these
 25 weights to apportion revenue of each accused PAN product into the amount that is attributable to
 26 infringement and the amount attributable to non-infringing features.”).)

27 Courts frequently approve of Finjan’s apportionment process here: beginning with a
 28 technical investigation and continuing with an economic analysis. *Finjan, Inc. v. Sophos, Inc.*, No.

1 14-CV-01197-WHO, 2016 WL 4268659, at *3 (N.D. Cal. Aug. 15, 2016) (hereinafter “*Sophos*”)
 2 (“[The damages expert] relied on the opinions of [the technical expert], who conducted an
 3 investigation into this issue that he lays out in his report. [The damages expert] is entitled to rely on
 4 [the technical expert’s] opinion.”); *Cisco*, No. 17-CV-00072-BLF, 2020 WL 13180005, at *9 (N.D.
 5 Cal. Apr. 21, 2020) (“[The damages expert] properly relied on Finjan’s technical experts’ opinion
 6 that AMP has eight features of equal value.”); *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299,
 7 1313 (Fed. Cir. 2018) (hereinafter “*Blue Coat*”) (approving of damages expert’s apportionment
 8 opinion based on “her discussions with Mr. Medovic, a Finjan technical expert who explained the
 9 use of architectural diagrams and identified certain components within the diagram that did and did
 10 not infringe.”).

11 **1. Dr. Keromytis offers qualified, supported opinions**

12 PAN exploits a single paragraph of Dr. Keromytis’s report to make two separate arguments
 13 in its Motion asking to exclude the entirety of Dr. Keromytis’s detailed, technical apportionment
 14 analysis. (*See generally* Mot. at 8-10 (quoting Keromytis Rpt. ¶ 492).) PAN cites to two references
 15 to “consumer demand” to frame Dr. Keromytis as providing an economic opinion. He does not.

16 PAN does not challenge Dr. Keromytis’s technical qualifications or analyses. (*See* Mot. at
 17 8:6-7 (“an expert’s technical experience may qualify them to testify about the features of a given
 18 technology”.) Instead, PAN takes issue with Dr. Keromytis’s statements that he (a) “understood
 19 the consumer demand for PAN’s accused products to be largely driven by their intended
 20 functionality, e.g., preventing malware”; and accordingly (b) “assigned weights to each feature and
 21 sub-feature based on that feature’s or sub-feature’s contribution to the consumer demand for the
 22 overall product.” (*See* Mot. at 8-10 (quoting Keromytis Rpt. ¶ 492).) From this, PAN asks the
 23 Court to exclude Dr. Keromytis’s entire technical apportionment analysis. As Dr. Keromytis makes
 24 clear, he is not offering economic opinions—Finjan supplies those through its damages expert, Dr.
 25 Maness. (Mot., Ex. 1 (Keromytis Rpt.) ¶ 87.) The opinions that Dr. Keromytis provides are limited
 26 to his weighted feature analysis, which is based on his technical analysis of the accused products’
 27 **intended functionality.** (*Id.* ¶ 87, 492.) For example, Dr. Keromytis explains that he assigned
 28 greater weight to features that are critical and prerequisites for other features, while he assigned

1 lower weight to features that are cosmetic or only useful in certain environments. (*See, e.g., id.* ¶¶
 2 493-494.) Dr. Keromytis also provides numerous citations to documents and testimony (discussed
 3 *infra*) to support his opinions, which are closely tethered to the facts of the case. (*Id.*) These are
 4 appropriate, substantiated opinions for a technical expert to present, as the cases discussed above
 5 have held. In fact, one of PAN’s own cases demonstrates the need for such a technical feature
 6 analysis, where the court in *Stragent, LLC v. Intel Corp.*, No. 6:11-CV-421, 2014 WL 1389304, at
 7 *4 (E.D. Tex. Mar. 6, 2014), excluded the testimony of a damages expert who attributed values to
 8 various features of the accused product without any technical or factual basis.

9 Dr. Keromytis’s brief reference to consumer demand is to provide a contextual explanation
 10 for his *understanding* (not opinion) that demand relates to intended functionality. In other words,
 11 Dr. Keromytis merely explains his logical understanding that customers buy PAN’s products
 12 because they work as intended. Dr. Keromytis supports this understanding with a cite to PAN’s
 13 witness testifying “that the features PAN chooses to highlight in its materials are decided ‘by what
 14 we’re seeing business need from our prospects and customers.’” (Mot., Ex. 1 (Keromytis Rpt.) ¶
 15 491 (citing Lee Dep. Tr.)) PAN is wrong to suggest that “[t]his [understanding] serves as the basis
 16 for his entire opinion.” (Mot. at 9:22-23.) Dr. Keromytis’s detailed feature analysis—set forth over
 17 the next twelve paragraphs of his report and the appended tables and diagrams—in no way rises and
 18 falls with this understanding. To the extent PAN feels that Dr. Keromytis’s understanding somehow
 19 undermines the veracity of his feature analysis, then PAN is able to challenge that on cross-
 20 examination. *See Cisco*, 2020 WL 13180005, at *9. It does not provide grounds to exclude Dr.
 21 Keromytis’s technical feature analysis in its entirety.

22 **2. Dr. Maness properly relies on Dr. Keromytis’s opinions**

23 Dr. Maness’s apportionment analysis properly applies Dr. Keromytis’s technical analysis,
 24 and conducts a further economic analysis based on that technical analysis. First, Dr. Maness works
 25 through each level of Dr. Keromytis’s apportionment table to calculate feature-specific weights,
 26 providing the following example:

27 NGFW’s “Application Signature” sub-feature accounts for 20 percent of the App-
 28 ID subfeature, which itself accounts for 15 percent of the Scan Incoming Network
 Traffic / Single-Pass Scanning sub-feature, which comprises 60 percent of the

1 Inspection/Classification/Reclassification: Malware Detection feature, which is
 2 given a 55 percent weight in NGFW. The “Application Signature” sub-feature thus
 3 makes up 20 percent x 15 percent x 60 percent x 55 percent = 0.99 percent of the
 4 overall NGFW product.

5 (Mot., Ex. 6 (Maness Rpt.) ¶ 50.) Next, Dr. Maness “multipl[ies] the accused sales of PAN’s
 6 products by their corresponding feature weights,” which “gives the apportioned feature-specific
 7 sales base.” (*Id.* ¶ 51.) As Dr. Maness explains: “I apportion the base at the feature level because
 8 different features infringe different patents.” (*Id.*)

9 PAN faults Dr. Maness’s analysis here because he “adopts Dr. Keromytis’s weighting
 10 scheme wholesale, without any adjustment or independent analysis.” (Mot. at 15:1-2.) PAN cites
 11 to no authority requiring a damages expert to make adjustments to a technical expert’s technical
 12 feature analysis, nor would such an adjustment be appropriately within Dr. Maness’s economic
 13 expertise. Indeed, PAN almost certainly would have complained if Dr. Maness (a damages expert)
 14 made such adjustments to Dr. Keromytis’s technical analysis. As discussed above, courts have
 15 approved Dr. Maness’s approach of relying on a technical expert’s feature analysis as part of the
 16 overall apportionment analysis. *See Sophos*, 2016 WL 4268659, at *3; *Cisco*, 2020 WL 13180005,
 17 at *9; *Blue Coat*, 879 F.3d at 1313.

18 The only case PAN cites in support of its argument here, *Finjan LLC v. SonicWall, Inc.*, 84
 19 F.4th 963, 968, 975-77 (Fed. Cir. 2023) (hereinafter “SonicWall”), is expressly distinguishable from
 20 the facts in this case. In *SonicWall*, the court excluded an expert apportionment analysis where the
 21 documents relied on by the plaintiff’s experts divided “top-level functions” into “additional sub-
 22 features,” but the experts “presented no analysis to assess the value of the sub-features[.]” 84 F.4th
 23 at 976. Here, Drs. Keromytis and Maness perform the analysis that the expert in *Sonic Wall* did not.
 24 Both of Finjan’s experts consider the presence and value of numerous sub-features in their granular
 25 apportionment analyses. *See* Mot., Ex. 2.

26 As set forth above, Drs. Keromytis and Maness each provide appropriate, supported
 27 analyses—based on their respective qualifications in technology and economics—that combine to
 28 make up Finjan’s overall apportionment analysis.

1 **B. Dr. Keromytis Applies a Reliable Apportionment Methodology**

2 Dr. Keromytis's methodology is neither "plucked out of thin air" nor "an arbitrary, black
 3 box methodology," as PAN accuses. (Mot. at 2:2, 10.) On the contrary, PAN's brief itself
 4 demonstrates the thorough nature of Dr. Keromytis's analysis. Though PAN disparages Dr.
 5 Keromytis's methods as "arbitrary," it dedicates a page and a half of its Motion to explain the
 6 detailed analysis Dr. Keromytis performed. (Mot. at 2:24-4:9.) Dr. Keromytis's analysis reflects,
 7 and goes beyond, what courts have previously held to be sufficient.

8 **1. Dr. Keromytis's feature analysis is unquestionably detailed and
 9 sufficient**

10 As PAN describes, Dr. Keromytis provides an Appendix G that includes (1) a list of features
 11 and sub-features in the accused products; (2) a list of the asserted patents with X marks to indicate
 12 whether each feature and sub-feature infringes any of the asserted patents; and (3) Dr. Keromytis's
 13 weighted values along with a level coding system for each of the features and sub-features. (Mot.
 14 at 3:9:24.) In total, Dr. Keromytis identified and considered 131 features and sub-features across
 15 five accused products, classified down to four sub-levels. (*See* Mot., Ex. 2 (Keromytis Rpt., App'x
 16 G).) PAN does not, and cannot, dispute the sufficiency of the detailed technical analysis Dr.
 17 Keromytis performed classifying the features in PAN's accused products. Indeed, the Federal
 18 Circuit and courts in this district have approved of similar, but less detailed, analyses of the technical
 19 features of accused products. *Blue Coat*, 879 F.3d at 1313 (Fed. Cir. 2018) (approving of an
 20 apportionment analysis based on twenty-four top level features that were given equal weights);
 21 *Cisco*, 2020 WL 13180005, at *9 (N.D. Cal. Apr. 21, 2020) (approving of an apportionment analysis
 22 based on eight equally weighted features).

23 **2. Dr. Keromytis's weighting methodology is reliable**

24 PAN's dispute with Dr. Keromytis's apportionment table relates to his weighting
 25 methodology. As with his feature analysis, Dr. Keromytis's weighting methodology is sound. Dr.
 26 Keromytis considered and weighed each of the 131 identified features and sub-features based on a
 27 multi-step process. (Mot., Ex. 1 (Keromytis Rpt.) ¶ 492.) As Dr. Keromytis explains in his report:
 28 "If there was no reason in PAN's documents or based on my experience to do otherwise, I weighted
 each of the features at the same level equally." (*Id.*) But where his "experience and the evidence

1 provided by PAN showed that certain features or sub-features were more valuable to consumer
 2 demand,” Dr. Keromytis adjusted those features’ weights up or down accordingly. (*Id.*) As
 3 discussed below, this weighting methodology goes above and beyond other weighting methods that
 4 have already garnered court approval.

5 **a. Courts have approved of attributing equal weights to a multi-
 feature product**

7 PAN first criticizes Dr. Keromytis’s equal weight determinations as a “default arbitrary . . .
 8 black box methodology.” (Mot. at 11:3-4.) But Dr. Keromytis did not simply divide the number
 9 of total features evenly to arrive at equal weights across the board. After individually considering
 10 each feature, Dr. Keromytis assigned equal weights to less than half of the total features, and did so
 11 only when he, in his technical opinion, determined there was no evidence showing that the features
 12 should be adjusted up or down. That is not an arbitrary analysis. It is a well-reasoned analysis from
 13 a qualified technical expert with decades of experience in the field.

14 The Federal Circuit and courts in this district have rejected the argument PAN makes here
 15 on multiple occasions as going to the weight, not admissibility, of the evidence. In *Blue Coat*, the
 16 Federal Circuit rejected the defendant’s argument against the damages expert’s opinion that each of
 17 twenty-four “functions” should be treated as equally valuable. 879 F.3d at 1313. In that case, it
 18 was the damages expert who made the decision to apply equal weights based on “her discussions
 19 with [plaintiff’s technical expert].” *Id.* Based on these discussions, the court held that “[t]he jury
 20 was entitled to believe the plaintiff’s expert.” *Id.* Here, Finjan has provided not just discussions
 21 between the experts, but a full technical expert analysis for its damages expert to rely on. As in *Blue*
 22 *Coat*, PAN can cross-examine both Drs. Keromytis and Maness on the detailed analysis of technical
 23 features that Dr. Keromytis performed.

24 This case is also analogous to *Cisco*, where the plaintiff’s technical experts “identif[ied]
 25 eight features in the [accused product] and assign[ed] each feature equal weight,” which the
 26 plaintiff’s damages expert relied on for her apportionment analysis. 2020 WL 13180005, at *9. The
 27 defendant challenged both the technical experts’ analysis and the damages expert’s reliance on that
 28 analysis. *Id.* As to its challenge against the technical experts, the defendant provided “other

1 documents and testimony” that it purported to “contradict the *ipse dixit* conclusion that [the accused
2 product] has only eight features and that these features are equally valuable.” *Id.* The court rejected
3 this argument because “[d]isputes on the factual underpinnings of an expert’s analysis go to its
4 weight, not admissibility.” *Id.* Here, PAN’s challenge falls short of even that in *Cisco*. PAN has
5 offered no evidence undermining or contradicting Dr. Keromytis’s opinion.

6 PAN’s only support is two out-of-circuit cases that are distinguishable and cannot supplant
7 the Federal Circuit and N.D. Cal. controlling authority discussed above. In *Stragent*, the court
8 excluded the testimony of a *damages* expert who, without any technical or factual basis, attributed
9 equal weight to the various features of the accused product. 2014 WL 1389304, at *4. In excluding
10 the opinion, the court noted the damages expert’s admission that “I am not, nor do I hold myself out
11 to be, a technical expert in these technologies.” *Id.* This case—excluding a damages expert’s
12 opinion based on his lack of technical knowledge—is inapposite to the situation here, where Finjan’s
13 qualified technical expert has provided opinions well within the scope of his technical expertise.
14 PAN’s other case, *Realtime Data, LLC v. Oracle Am., Inc.*, No. 6:16-CV-88-RWS-JDL, 2017 WL
15 11574028 at *6 n.2 (E.D. Tex. Mar. 30, 2017), did not even decide the issue related to feature
16 apportionment. There, the court was similarly faced with a damages expert attributing equal weights
17 without technical support. *Id.* at *5. But in that case, the court declined to reach the issue of equal
18 weighting, explaining (in the footnote that PAN cites): “given that the Court finds it appropriate to
19 strike Dr. Keller’s ‘starting-point apportionment’ analysis altogether, the *equal weighting* of
20 features in that analysis *is no longer at issue.*” *Id.* at *6 n.2 (emphasis added). This case simply
21 does not support—or even reach—the argument PAN makes here.

b. Dr. Keromytis provides reasonable adjustments to certain product features

24 Given the controlling authority approving of prior expert opinions applying equal weights
25 across all features, Dr. Keromytis could have reasonably stopped his analysis by doing exactly that.
26 But Dr. Keromytis took another step to determine whether and which features should be given
27 greater or lesser value, finding over half of the 131 features to be deserving of adjustment. It would
28 stand to reason that this would satisfy PAN's concerns of "default arbitrary equal weighting" (Mot.

1 at 11:3), but PAN again criticizes Dr. Keromytis's adjustments as "arbitrary" and "plucked from
 2 thin air." (Mot. at 13:22-24.) Not so. Dr. Keromytis provides in his report a feature-by-feature
 3 (and sub-feature-by-sub-feature) explanation for every adjustment he made in his weighting
 4 methodology, which he supports with his technical experience and PAN's own documents and
 5 deposition testimony from this case. (See Mot., Ex. 1 (Keromytis Rpt.) ¶¶ 493-504.) For example,
 6 Dr. Keromytis provides the following explanation for three sub-features of PAN's NGFW product:

7 I assigned the greatest weight to Scan Incoming Network Traffic / Single-Pass
 8 Scanning (2.A.I – 60%) because it is a prerequisite for Sending Files to WildFire
 9 (2.A.II – 20%) and Activity Monitoring (2.A.III – 20%), which I split evenly. PAN
 10 has repeatedly touted Single-Pass Scanning as a critical feature of its products, and
 11 Mr. Lee testified that "a single-pass architecture will accelerate the ability to
 12 identify threats." Lee Dep. Tr. at 70:15-20; see also id. at 94:12-22 ("scanning once
 13 is more efficient than going through multiple passes"); PAN_FIN00681218 at 5.

14 (Id. ¶ 494.) Where other experts may have simply split the three sub-features evenly (or not even
 15 reached this level of sub-feature at all), Dr. Keromytis explains in the quoted passage above that
 16 Single-Pass Scanning should carry more weight because it is a prerequisite to the other sub-features,
 17 and PAN repeatedly touts it as a critical feature. (Id.) Also shown above, Dr. Keromytis then cites
 18 multiple deposition quotes and documentary evidence in support. (Id.) That is not an "arbitrary
 19 black box methodology" that he "plucked from thin air." It is a well-reasoned and substantiated
 20 analysis that is tethered to the facts of the case.

21 PAN frequently cites to *NetFuel, Inc. v. Cisco Sys. Inc.*, No. 5:18-CV-02352-EJD, 2020 WL
 22 1274985, at *7 (N.D. Cal. Mar. 17, 2020) to support its argument. As with PAN's other cited
 23 authority, *NetFuel* is inapposite. In that case, the plaintiff's technical expert provided high-level
 24 estimations (e.g., 33% and 50%) for what he believed to be the overall contributions of the infringing
 25 and non-infringing features of the accused products. *Id.* at *8. The court disagreed with this
 26 methodology because the expert "failed to explain the methodology underlying his percentage
 27 calculation and [] relied on vague assertions about the Accused Feature's value." *Id.* The court
 28 cited two examples: first, where the expert arrived at 70% based on his determination that the
 defendant's "infringing functionality is 'somewhat more than twice as valuable' as its non-
 infringing functionality"; and second, where the expert arrived at 40% because the defendant's

1 “non-infringing functionality ‘slightly outweighs’ its infringing functionality”. *Id.* at *10. No other
 2 analysis of the features was done. *Id.* Here, by contrast, Dr. Keromytis provides a far more detailed
 3 and granular feature analysis and weighting methodology (considering 131 distinct features and sub-
 4 features over four levels) that result in precise values.

5 Finally, PAN cites to Dr. Keromytis’s deposition, where PAN quibbled with him over his
 6 decision to attribute 55% to an NGFW feature, asking: “Why not put it at 65 percent”? (Mot. at
 7 13:10-15.) Dr. Keromytis responded that he based his decision on what features he uses and relies
 8 on most from his experience “us[ing] firewalls daily.” (*Id.*) The Federal Circuit has made clear:
 9 “we have never required absolute precision in this task; on the contrary, it is well-understood that
 10 this process may involve some degree of approximation and uncertainty.” *Virnetx, Inc. v. Cisco*
 11 *Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014). PAN’s motion asks for absolute precision, taking
 12 issue with any feature value that Dr. Keromytis does not point to an exact number to substantiate.
 13 But that level of precision is not required by the law. Dr. Keromytis’s well-reasoned approximations
 14 are sufficient under the Federal Circuit’s standard, and PAN’s motion to exclude his opinions on
 15 apportionment should be denied.

16 IV. DR. MANESS OFFERS RELIABLE DAMAGES OPINIONS

17 A. Dr. Maness’s Royalty Base Opinions Are Admissible

18 1. Dr. Maness provides a reliable apportionment analysis that properly 19 appports patented from unpatented features in the accused products

20 PAN’s criticism of Dr. Maness’s apportionment analysis seeks to bolster PAN’s expert’s
 21 own unreliable methodology. As Finjan laid out in its Motion to Exclude Opinions of Stephen E.
 22 Dell (Dkt. Nos. 318, 320-3), PAN’s expert improperly excludes the revenue of the accused hardware
 23 products because those hardware products are allegedly “conventional” and “non-inventive.” Mr.
 24 Dell excludes this revenue despite acknowledging that PAN’s hardware products are, alone, accused
 25 of infringement. (Dkt. No. 318 § III.A.) PAN now argues that Dr. Maness’s apportionment analysis
 26 is flawed because he did not exclude all “conventional hardware” sales. (Mot. at 15-20.) As
 27 discussed below, PAN’s argument is wrong and inconsistent with the law, and Dr. Maness’s
 28 opinions comport with the facts and the law.

- a. The law requires an apportionment analysis to focus on patented and unpatented features

3 This dispute arises out of PAN’s incorrect understanding of the governing case law. PAN
4 and its expert incorrectly insist that an apportionment analysis should focus on separating features
5 in the accused products that are “conventional” from those that are “inventive” or “non-
6 conventional”—without regard to which features are patented. Conversely (and correctly),
7 Dr. Maness focuses on apportioning unpatented features from patented features, which follows a
8 long line of Federal Circuit and Supreme Court precedent, including the cases cited by PAN. See,
9 e.g., *Commonwealth Sci. & Indus. Rsch. Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301 (Fed.
10 Cir. 2015) (explaining an apportionment analysis must separate “between the patented feature and
11 the unpatented features”) (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)); *VirnetX, Inc. v.*
12 *Cisco Sys., Inc.*, 767 F.3d 1308, 1327 (Fed. Cir. 2014) (same); *Lucent Techs., Inc. v. Gateway, Inc.*,
13 580 F.3d 1301, 1337 (Fed. Cir. 2009) (same).

14 The main case PAN cites in support of its position here, *Omega Pats., LLC v. CalAmp Corp.*,
15 13 F.4th 1361, 1377 (Fed. Cir. 2021), is not on point. There, the plaintiff presented an “entire market
16 value” theory to the jury, arguing “it did not need to show apportionment at all”. *Id.* at 1377. Under
17 this theory, the plaintiff in *Omega* argued that “the multi-vehicle-compatibility feature of the
18 [accused products] ‘primarily, if not exclusively’ drove sales.” *Id.* at 1378. The court rejected this
19 argument, finding that the accused products “would still have had value absent this feature,” where
20 the court identified three example “additional features” of the accused products that were not
21 patented features. *Id.* Ultimately, the court held, “we conclude that the jury could not reasonably
22 have found that the multi-vehicle-compatibility feature of the [accused products] drove demand for
23 the entire [accused products].” *Id.*

24 Conversely here, Finjan's experts go to great lengths to identify and exclude non-infringing,
25 unpatented features from the damages base. That analysis is done by determining the features of
26 the products, determining how important those features are to the functionality of the products, and
27 then apportioning out the value of unpatented features. At no point do Finjan's experts opine that

1 one or more of the patented features, by themselves, make up the entire market value of PAN’s
 2 accused products.

3 PAN’s other cited cases—*Puff Corp. v. SHO Prod., LLC* and *VirnetX, Inc. v. Cisco Sys., Inc.*—are similarly distinguishable. Both cases likewise consider damages opinions that apply the
 4 entire market value rule and fail to apportion between specific patented and unpatented features.
 5 This alone renders these cases non-analogous to Dr. Maness’s apportionment analysis, which
 6 apportions out the revenue related to unpatented features. Moreover, both cases support Finjan’s
 7 position by applying the correct apportionment analysis, which focuses on patented and unpatented
 8 features. In *Puff Corp. v. SHO Prod., LLC*, No. CV 22-2008-GW-KSx, 2024 WL 2208929, at *7
 9 (C.D. Cal. Apr. 19, 2024), PAN’s own parenthetical makes this point. As PAN explains, the court
 10 there found the expert to have “failed to apportion between features **covered by the asserted claims**
 11 and **unclaimed features** like ‘batteries, circuit boards, features related to wireless connectivity,
 12 etc.’” (Mot. at 20:16-19 (quoting *Puff*, WL 2208929, at *7) (emphasis added).) Almost identically,
 13 the court in *VirnetX*, 767 F.3d 1308, 1327 (Fed. Cir. 2014) explained that the plaintiff’s damages
 14 expert “did not even attempt to subtract any other **unpatented elements** from the base, which
 15 therefore included various features **indisputably not claimed** by [the plaintiff], e.g., touchscreen,
 16 camera, processor, speaker, and microphone, to name but a few.” (Emphasis added). Dr. Maness
 17 did exactly what these cases require—separating the revenue from patented features and unpatented
 18 features—something the experts in *Puff* and *Virnetx* failed to do.

20 Courts at all levels have consistently required an apportionment analysis to separate between
 21 patented and unpatented features. PAN has failed to cite any authority to suggest that the
 22 apportionment analysis requires another step—that an expert must additionally consider whether
 23 patented features are either “conventional” or “inventive.” Indeed, such a proposition would seem
 24 to render worthless many patents that are novel combinations of “conventional” features. Not even
 25 PAN’s own expert analyzes the products feature-by-feature to determine, first, whether they are
 26 patented, and second, whether they are conventional. In fact, PAN’s expert fails to consider a single
 27 feature of any of the accused products, instead broadly excluding an entire class of products because
 28 they are “hardware.” *That* is an unreliable apportionment opinion—not Finjan’s.

b. Dr. Maness properly excludes unpatented features from his royalty base

- i. The law does not require apportioning the value of “conventional” from “unconventional” patented features

PAN criticizes Dr. Maness for purportedly ignoring the contribution of “conventional and non-infringing components,” which PAN later generally relates to “hardware” revenue. (Mot. at 15:8-9.) PAN’s argument has two major flaws. First, PAN appears to conflate the terms “conventional” with “non-infringing” in an attempt to jam the facts here into the cases it attempts to rely upon. But as discussed above, the law requires apportioning patented from unpatented features. *See Commonwealth Sci. & Indus.*, 809 F.3d at 1301. It does not, as PAN argues, require further apportioning “conventional” patented features from “unconventional” patented features. Second, Dr. Maness does exactly what the law requires: he apportions the value of non-infringing features out of the damages base through his reliance on Dr. Keromytis’s detailed feature analysis and weighting methodology. Indeed, as to the “hardware” that PAN alleges is “conventional,” Dr. Maness, through his reliance on Dr. Keromytis, specifically accounts for those hardware features. Nothing more is required.

While PAN challenges Dr. Keromytis’s weighting of various features as described above, it does not challenge the feature-by-feature infringement analysis in Appendix G. (See Mot., Ex. 2 (Keromytis Rpt., App’x G).) In that analysis, Finjan’s technical experts considered whether each of the 131 product features individually infringes each of the four then-asserted patents (prior to the ’154 Patent’s dismissal)—comprising 524 total determinations. (*Id.*) For example, Finjan’s experts considering the NGFW product—a product PAN argues should be excluded from the damages analysis in its entirety—found 20/42 features to infringe the ’731 Patent, 15/42 features to infringe the ’408 Patent, and 5/42 features to infringe the ’633 Patent. (*Id.*) In conducting their analysis, one of the features of NGFW that Finjan’s experts considered was “Hardware Only Features.” (*Id.* at 2.) For each of the asserted patents, Finjan’s experts determined that the “Hardware Only Features” do not infringe the asserted patents. (*Id.*) Based on that infringement analysis, Dr. Maness excluded value of the non-infringing “Hardware Only Features” from the damages base.

1 Dr. Maness did the same thing for all other non-infringing features, excluding the value of those
2 features from the apportioned damages base.

3 Unlike in PAN’s cited cases, where the courts specifically identified unpatented features that
4 should have been excluded (*see Omega*, 13 F.4th at 1377 (identifying three unpatented features: “a
5 ‘3-axis accelerometer,’ the ability to ‘detect hard braking, cornering[,] or acceleration,’ and an
6 ‘industry leading on-board alert engine.’”); *VirnetX*, 767 F.3d at 1327 (identifying unpatented
7 “touchscreen, camera, processor, speaker, and microphone”); *Puff*, WL 2208929, at *7 (identifying
8 unpatented “batteries, circuit boards, features related to wireless connectivity”)), PAN does not, and
9 cannot, point to a single unpatented feature that Dr. Maness improperly included in his apportioned
10 royalty base. Instead, PAN broadly suggests that Dr. Maness should have excluded “hardware”
11 products entirely (as Mr. Dell does in his report). (Mot. at 19-20.) But PAN’s accused “hardware”
12 encompasses multiple products, each of which have numerous features and sub-features. For
13 example, PAN’s NGFW product, which Mr. Dell excludes entirely as “hardware,” has at least forty-
14 two features based on PAN’s own marketing materials. (Mot., Ex. 2 (Keromytis Rpt., App’x G) at
15 1-2.) PAN does not mention a single one of these features by name, much less identify a specific
16 feature as being unpatented but improperly included in Dr. Maness’s royalty base. By PAN’s own
17 admission, the asserted patent claims require hardware components. (*See* Mot. at 20:1 (“the asserted
18 claims require nothing more than generic, conventional hardware”).) Given that, PAN is only left
19 to criticize Dr. Maness for not “attempt[ing] to **apportion out** the value of any portion of any
20 **infringing features** of any of the asserted patents as conventional.” (*Id.* at 16:12-13 (emphasis
21 added).) The law requires apportioning out unpatented, non-infringing features from the royalty
22 base—leaving the patented, infringing features. Thus, PAN’s criticism of Dr. Maness for not
23 excluding infringing features is unwarranted. PAN cites to no case that requires excluding
24 infringing features from a royalty base.

ii. PAN fails to support its contention that the accused hardware products are entirely “conventional” and should be excluded

27 As discussed above, Drs. Maness and Keromytis acknowledge that PAN's NGFW product
28 comprises certain features, some of which are patented and some of which are not. In response,

1 Dr. Maness appropriately excludes the unpatented, non-infringing features from his royalty base,
 2 including “Hardware Only Features.” PAN, on the other hand, contends that the entire NGFW
 3 product should be excluded as “conventional.” (See Dkt. No. 320-4 (Dell Rpt.) Attach. 4A-B.) This
 4 is not a case where PAN’s accused hardware is simply a metal box that does nothing. As Dr.
 5 Keromytis sets forth in his report, PAN’s NGFW product, alone, performs the infringing
 6 functionality of the ’408 Patent. As a matter of law, this accused product must be included in the
 7 damages analysis. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009) (“The
 8 hypothetical negotiation [] assumes that the asserted patent claims are valid and infringed.”). That
 9 PAN also separately sells software that is accused of infringement does not mean that PAN’s
 10 hardware products, which are also accused of infringement on their own, should be excluded.

11 Even if PAN’s interpretation of the law—that it could be proper to exclude entire accused
 12 products—were correct (it is not), PAN provides no evidentiary support for its argument that any
 13 infringing features are “conventional” and should be excluded. As of the grant of the ’408 Patent
 14 (which Finjan asserts against NGFW), the patent office found at least some or a combination of its
 15 claimed features to be novel and inventive. Even if PAN were legally permitted to exclude certain
 16 of those claimed features as “conventional,” it has not presented any analysis parsing what it
 17 considers to be the “conventional” as opposed to “inventive” features of the ’408 Patent’s claims.
 18 Instead, PAN and its expert exclude the entirety of the accused hardware products—and criticize
 19 Dr. Maness for not doing the same. Under any legal interpretation, this cannot be allowed.

20 Finjan’s experts engaged in a thorough, detailed apportionment process that individually
 21 considered, parsed, and weighed numerous product features and sub-features. PAN does not
 22 identify any of these specific features or sub-features as “conventional,” much less provide evidence
 23 to support such a claim. So under any legal interpretation, Finjan’s apportionment analysis must be
 24 sufficient to present to the jury. To the extent PAN considers any of Finjan’s experts’ feature
 25 determinations to be factually incorrect, that goes to the weight not admissibility of the opinions.
 26 See *Cisco*, 2020 WL 13180005, at *9. But at this stage, PAN has presented no argument, legal or
 27 factual, that can properly challenge the admissibility of Finjan’s experts’ apportionment analyses.
 28

2. The dismissal of the '154 Patent does not undermine Dr. Maness's opinions

3 PAN’s argument regarding Dr. Maness’s consideration of the ’154 Patent is difficult to
4 follow. Without explicitly stating it, PAN appears to accuse Dr. Maness of double counting. (See,
5 e.g., Mot. at 18:4-5 (arguing that “Dr. Maness [] attributes the full value of a given feature to each
6 individual patent.”).) The only case PAN cites to support its argument, *Finjan v. Sophos*, expressly
7 considers a situation where an expert was accused of double (and even triple) counting. 2016 WL
8 4268659, at *3 (“Sophos moves to exclude Layne-Farrar’s testimony on the grounds that she
9 improperly inflated the royalty base by **double or triple counting** revenue attributable to certain
10 features of the accused products.”) (emphasis added). Therefore, PAN’s argument either relies on
11 the assumption that Dr. Maness double counts (which he does not), or PAN’s argument is devoid of
12 legal support.

13 To be sure, Dr. Maness does not double count any revenue in his analysis, and he explains
14 in his report the steps he takes to avoid doing so:

15 For features that infringe multiple patents, I measure accused sales as all sales of
16 the accused product starting from the earliest date of first infringement for all
17 infringed patents and ending on the last expiration date of the infringed patents.
This avoids double counting.

18 (Mot., Ex. 6 ¶ 51 (emphasis added).) In other words, Dr. Maness counts each infringing feature
19 once, whether it infringes one or more patents. The adjustment he then makes for features that
20 infringe multiple patents is to the time period so that his calculations consider the infringing features
21 for the time that they infringe at least one asserted patent. This is a different approach than the one
22 applied in *Sophos* where the court found that the expert “counts the revenue attributable to certain
23 features ***multiple times*** in calculating her royalty base”. 2016 WL 4268659, at *3 (emphasis added).
24 That is simply not what Dr. Maness does.

25 PAN argues that the dismissal of the '154 Patent somehow undermines Dr. Maness's
26 opinion, contending that Dr. Maness cannot attribute the full value of a feature that was accused to
27 infringe the '154 Patent along with two other asserted patents. (Mot. at 7-16.) This argument
28 suggests that the value of a feature should be discounted if it is alleged to infringe multiple patents,

1 as compared to a feature that is only alleged to infringe one patent. PAN cites no legal authority to
 2 support its argument, and it defies common sense. Doubling down on its flawed argument, PAN
 3 appears to contend that every product feature alleged of infringing the '154 Patent has now been
 4 exonerated of infringement as of that patent's dismissal. (Mot. at 18:10-12.) Not so. A finding of
 5 infringement requires every limitation of a patent claim to be met. So a single feature of a product
 6 could practice similar limitations across multiple patents, even where the overall product may not
 7 infringe one of the patents for lack of an entirely separate limitation.

8 Demonstrative of PAN's flawed logic is its example of the Static Analysis feature from the
 9 accused NGFW product. (See Mot. at 17-18.) Finjan's technical experts determined that Static
 10 Analysis was an infringing feature for the '731, '408, and '154 Patents. (See Mot., Ex. 2 (Keromytis
 11 Rpt., App'x G) at 2.) Separately, Dr. Keromytis determined a weighted value for the Static Analysis
 12 based on its value to the overall NGFW product. (*Id.*) By PAN's incorrect theory, this feature
 13 should be given a different value (and potentially none) depending on whether it is found to infringe
 14 one, two, or three of these asserted patents. Conversely, under Dr. Maness's correct approach, the
 15 Static Analysis feature is counted exactly once according to its value (as long as it remains an
 16 infringing feature of at least one asserted patent), and adjustments are made to the start and end dates
 17 of infringement based on which patents are ultimately found to be infringed. (Mot., Ex. 6 (Maness
 18 Rpt.) ¶ 51.)

19 PAN can cross-examine the experts on that at trial regarding the weight given to various
 20 features. *See Cisco*, 2020 WL 13180005, at *9. But PAN has presented no evidence or authority
 21 to suggest that Dr. Maness's methodology is legally inadmissible.

22 **B. Dr. Maness Properly Analyzes the *Georgia-Pacific* Factors and Finjan Licenses
 23 in Support of His Royalty Rate Opinions**

24 Dr. Maness analyzes all of the *Georgia-Pacific* factors, and concludes that the result of a
 25 hypothetical negotiation would have been a royalty rate of [REDACTED]
 26 [REDACTED]. (Mot., Ex. 6 (Maness Rpt.) ¶¶ 66-137, 153-189.) Like the
 27 analyses that courts in this district have previously found acceptable, Dr. Maness spends over 100
 28 paragraphs across approximately fifty pages explaining how the parties' past licenses and the other

1 *Georgia-Pacific* factors informed his analysis and conclusion. Dr. Maness also explains his
 2 conclusion that Finjan's past licenses are technologically and economically comparable to this case,
 3 including why those agreements support his opinions as to the appropriate royalty rate. In fact,
 4 PAN's expert, Dr. Dell relies on these same licenses as technologically and economically
 5 comparable to the license that would result from the hypothetical negotiation. (See Dkt. No. 320-4
 6 (Dell Rpt.) ¶ 284.) PAN's criticisms of Dr. Maness's analysis are not critiques of his methodology,
 7 but instead are complaints about the outcome of that methodology that can be fully explored on
 8 cross-examination.

9 **1. Dr. Maness's *Georgia-Pacific* factor analysis follows Federal Circuit's
 10 and this Court's case law**

11 Dr. Maness analyzes each of the fifteen *Georgia-Pacific* factors and their interactions to
 12 reach his conclusions on royalty rates. (Mot., Ex. 6 (Maness Rpt.) ¶¶ 152–189.) PAN is wrong to
 13 suggest that Dr. Maness's opinion "begins and ends" with rates from the *Secure Computing* jury
 14 verdict, or that Dr. Maness relies only on Finjan's Chairman to support those rates. (Mot. at 21.)
 15 Instead, Dr. Maness first reviews the terms of twenty-three Finjan agreements (Mot., Ex. 6 (Maness
 16 Rpt.) ¶¶ 63-137) and eight PAN license agreements (*id.* ¶¶ 138-151). He then analyzes those
 17 agreements in the context of *Georgia-Pacific* Factors 1 and 2, including the technological and
 18 economic similarities and differences between those agreements and the hypothetical negotiation.
 19 (*Id.* ¶¶ 153-157.) Finally, he further analyzes the remaining *Georgia-Pacific* factors and their impact
 20 on the rate that would have been agreed upon at the hypothetical negotiation. (*Id.* ¶¶ 159-188.)
 21 Based on that evidence and analysis, Dr. Maness concludes that the parties would have arrived at a
 22 royalty rate of [REDACTED] at the hypothetical negotiation. (*Id.* ¶ 189.)

23 The Federal Circuit has "consistently upheld experts' use of a hypothetical negotiation and
 24 *Georgia-Pacific* factors for estimating a reasonable royalty," and held that disagreements to the
 25 expert's conclusions from the *Georgia-Pacific* factors "go to the weight, not admissibility, of his
 26 opinion." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010). When the expert
 27 report indicates that the expert relies on a number of *Georgia-Pacific* factors in reaching an opinion
 28 on a reasonable royalty rate, criticism on how the expert quantifies the underlying facts "are

1 appropriate for cross-examination and not a basis for exclusion of [the expert's] testimony.”
 2 *MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 11-cv-5341-YGR, 2014 WL 2854890, at *4
 3 (N.D. Cal. June 20, 2014) (admitting the expert’s royalty rate opinion that used a 1% royalty starting
 4 point for two sets of patents and concluded a 1% royalty for one set and 10% royalty for the other,
 5 with allegedly “nearly the same” *Georgia-Pacific* analyses).

6 Dr. Maness addresses each license Finjan produced for the asserted patents, related patents,
 7 and other cybersecurity patents in Finjan’s portfolio. (Mot., Ex. 6 (Maness Rpt.) ¶¶ 62–137.) He
 8 details the reasons why he concludes each agreement is economically relevant and informative (*id.*)
 9 and specifies what circumstances make a specific license less comparable or result in impacts to the
 10 royalty rates, if any exist (e.g., *id.* at ¶¶ 76, 85, 97, 102, 105, 116, 120, 136). Dr. Maness further
 11 evaluates the effects of the other *Georgia-Pacific* factors to the hypothetical negotiation and adjusts
 12 the resulting royalty rates accordingly. For example, at *Georgia-Pacific* Factor 6, Dr. Maness
 13 considers how PAN’s product portfolio drives its sales based on the testimony of PAN’s witnesses,
 14 internal and third-party marketing documents, and the timeline of PAN’s product expansion. (Mot.,
 15 Ex. 6 (Maness Rpt.) ¶¶ 162–63.) Based on that analysis, he concludes that the factor would be
 16 neutral to the hypothetical negotiation. (*Id.*) As another example, for Factor 11, Dr. Maness
 17 analyzes PAN’s marketing materials and investor calls to consider how the accused products
 18 improve efficiency for customers. (*Id.* at ¶ 179.) From that analysis, he concludes that PAN’s use
 19 of the invention would favor the licensor in a hypothetical negotiation. (*Id.*) Dr. Maness reaches
 20 his conclusion of [REDACTED] only after analyzing the royalty rates in Finjan’s prior licenses
 21 in conjunction with the other evidence regarding the *Georgia Pacific* factors. (*Id.* at ¶¶ 188–89.)

22 Dr. Maness specifically enumerates the evidence supporting his [REDACTED], and
 23 does not merely rely on Finjan’s Chairman, as PAN suggests. (Mot. at 21:21–22.) As PAN admits,
 24 the *Secure Computing* jury awarded damages to Finjan by applying royalty rates of 8% for hardware
 25 and 16% for software. (Mot. at 21; *id.*, Ex. 6 (Maness Rpt.) ¶ 69.) Next, the *Sophos* jury heard
 26 Finjan’s damages expert’s opinion of a 6 to 8% royalty rate on hardware, an 8 to 16% royalty on
 27 software, and a total reasonable royalty of between \$8.7 and \$16.1 million. (Mot., Ex. 6 (Maness
 28 Rpt.) ¶ 75.) Ultimately, the jury awarded \$15 million in damages to Finjan, which fell within the

1 expert's estimated range and suggests a royalty rate consistent with the 8% and 16% rates utilized
 2 in *Secure Computing*. *Id.* Further, Dr. Maness [REDACTED]
 3 [REDACTED] . (*Id.*,
 4 Ex. 5A; *e.g.*, *id.* ¶ 120.) For example, [REDACTED]
 5 [REDACTED]
 6 [REDACTED] . (*Id.* ¶ 104.) In other licenses,
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] . (*See, e.g.*, Mot., Ex. 6 (Maness Rpt.) ¶¶ 76, 81, 83–84, 87–88, 90–91, 93, 111–113, 115–
 11 117, 120, 122–123, 125–126, 127, 131, 136; *see also id.*, Ex. 5A.) PAN's assertion that Dr. Maness
 12 does not show how Finjan's licenses apply these rates ignores all of this evidence. (Mot. 21:20-21.)
 13 Moreover, PAN's critiques about Dr. Maness's application and quantification of these [REDACTED]
 14 [REDACTED] do not support exclusion, but instead, are proper for cross-examination. *See MediaTek*,
 15 2014 WL 2854890, at *4.

16 PAN's arguments are similar to those rejected by other courts in this district, denying
 17 motions seeking to exclude [REDACTED] . In *Cisco*,
 18 the court allowed the 8% and 16% royalty rates to go to the jury when the expert "analyze[d] the
 19 particular circumstance surrounding Finjan's license agreements with third parties as well as the
 20 relationship between the parties and other relevant factors." 2020 WL 13180005, at *7. As
 21 described above, that is exactly what Dr. Maness has done here. Similarly, in *Sophos*, the court was
 22 "convinced" that the expert did not rely exclusively on the *Secure Computing* rates as her calculation
 23 considered many different factors. 2016 WL 4268659, at *5. Here, Dr. Maness similarly analyzes
 24 the particular circumstances surrounding the previous licenses and other relevant factors.

25 PAN's reliance on the exclusion of plaintiff's expert in *Blue Coat* is inapposite. There,
 26 plaintiff's expert had concluded that the appropriate reasonable royalty was \$8-per-user. While the
 27 Federal Circuit criticized that \$8 per user rate, those criticisms [REDACTED]
 28 [REDACTED] . Moreover, as discussed above, Dr. Maness supports his

opinions with specific analyses of Finjan's licenses and the *Georgia-Pacific* factors. As a result, *Blue Coat* does not support exclusion here.

Finally, PAN’s reliance on *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011) to suggest that the royalty rate analysis in *Secure Computing* applied the now rejected “rule of thumb” (Mot. at 23:15-16) is a misinterpretation of Federal Circuit precedent. In *Secure Computing*, the Federal Circuit first recognized that the expert “*considered a variety of factors* to conclude that the parties in a hypothetical negotiation would have agreed upon a ‘one-third/two-third split’ of operating profit margins.” *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1209 (Fed. Cir. 2010) (emphasis added). The Federal Circuit went on to explain that the expert “considered the custom in the industry, history of prior licenses, competitiveness of the parties, and the importance of the patented technology, among other factors, in concluding that the parties would have agreed that the plaintiff was entitled to 33% of the operating profit margin.” *Id.* at 1210–11. The court finally pointed out that the jury awarded lower total damages than the expert recommended, and thus did not “blindly adopt[]” the expert’s analysis. *Id.* at 1212. These facts from *Secure Computing* were not in question in *Uniloc*, and PAN’s reliance on *Uniloc*’s dicta discussion of *Secure Computing* to frame that analysis as “rule of thumb” is inapposite. (Mot. at 23:15–20); *see Uniloc*, 632 F.3d at 1314.

2. Dr. Maness Has Analyzed Finjan's Past License Agreements and Shows They Are Technologically and Economically Comparable

Dr. Maness analyzes whether each of Finjan’s license agreements is technologically and economically comparable, and “account[s] for differences in the technologies and economic circumstances of the contracting parties,” as required by Federal Circuit precedent. *See VirnetX*, 767 F.3d at 1330; (*see, e.g.*, Mot., Ex. 6 (Maness Rpt.) ¶¶ 63, 68, 70, 73, 76, 78, 81, 84-85, 88, 91, 94, 96, 97, 100, 102, 105, 107, 109, 112-13, 115-16, 120, 123, 126, 129, 131, 133, 136, 137.) PAN’s criticism of Dr. Maness’s conclusion that most of these licenses are technologically and economically comparable goes to the weight of Dr. Maness’s opinion, not its admissibility. *See Sophos*, 2016 WL 4268659, at *5. PAN’s criticism is also undermined by its own damages expert’s

1 reliance on these same licenses as technologically and economically comparable in his analysis.
 2 (See e.g., Dkt. No. 320-4 (Dell Rpt.) ¶ 284.)

3 The Federal Circuit “has recognized that licenses may be presented to the jury to help the
 4 jury decide an appropriate royalty award.” *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227
 5 (Fed. Cir. 2014). “Prior licenses, however, are almost never perfectly analogous to the infringement
 6 action” because they may cover, for example, “more patents than are at issue in the action.” *Id.*
 7 Thus, “[t]estimony relying on licenses must account for such distinguishing facts when invoking
 8 them to value the patented invention.” *Id.* However, “[t]he degree of comparability of the [prior]
 9 license agreements as well as any failure on the part of [the] expert to control for certain variables
 10 are factual issues best addressed by cross examination and not by exclusion.” *ActiveVideo*
 11 *Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012).

12 Dr. Maness evaluates the licenses’ technological comparability, and points out that the
 13 licenses cover the same technology and frequently the same patents as those at issue in this case.

14 For example, [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED].

18 (Mot., Ex. 6 (Maness Rpt.) ¶ 68.) [REDACTED]

19 [REDACTED]

20 [REDACTED] Dr. Maness thus finds these licenses are technologically
 comparable to the hypothetical negotiation. (Mot., Ex. 6 (Maness Rpt.) ¶¶ 73, 76, 78, 81, 84, 88,
 21 91, 94, 96, 97, 100, 102, 112-13, 115-16, 120, 123, 126, 129, 131, 133, 136.)

23 Dr. Maness, unlike the expert in *Blue Coat*, does not limit his analysis “to the fact that the
 24 infringing products in *Secure Computing* were also in the computer security field,” and that the
 25 parties in the licenses were PAN’s competitors. *Blue Coat*, 879 F.3d at 1312. [REDACTED]

26 [REDACTED]

27 [REDACTED]. Dr. Maness’s analysis is much more specific than the

28

1 “surface similarity” rejected by the Federal Circuit, and is sufficient as the basis for a reasonable
 2 royalty calculation. *See id.*

3 Further, Dr. Maness details the analysis that led to the conclusion the licenses he relies upon
 4 are economically comparable. (See, e.g., Dkt. No. 320-4 (Dell Rpt.) ¶ 284.) Dr. Maness considers
 5 the difference between a portfolio license and a license for only the asserted patents, and concludes
 6 that the resulting royalty rate would have been unaffected by the number of patents that were subject
 7 to the negotiation. (Mot., Ex. 6 (Maness Rpt.) ¶ 59; *see also id.* ¶¶ 73, 76, 78, 81, 84, 88, 91, 94,
 8 96, 97, 100, 102, 112-13, 115-16, 120, 123, 126, 129, 131, 133, 136.) To the extent PAN argues
 9 that Dr. Maness has not done a complete economic comparability analysis because many of the
 10 license agreements he relies upon included patents in addition to those at issue here, that argument
 11 has already been considered and rejected by a court in this district. In *Sophos*, the court declined to
 12 exclude the opinion of plaintiff’s expert on this point, stating that “[w]hile it may be the case that a
 13 patent portfolio and an individual patent would have different royalty rates, it is not logically or
 14 legally impossible for them to be similar or the same.” *Sophos*, No. 14-cv-01197-WHO, 2016 WL
 15 4268659, at *5.

16 PAN’s cases are, once again, distinguishable. In *Zimmer Surgical, Inc. v. Stryker Corp.*, the
 17 expert’s opinion was excluded because he “engage[d] in no analysis of the underlying litigation and
 18 how it may have affected the royalty rate,” and failed to “address the effect of the fixed payments
 19 in addition to the royalty rate, the effect of multiple patents being included in the license, or the fact
 20 that this license was one of a series of licenses.” 365 F. Supp. 3d 466, 496 (D. Del. 2019). In
 21 *DataQuill Ltd. v. High Tech Comput. Corp.*, the plaintiff’s expert “only stated that the ‘significant
 22 patent agreements’ and the license at issue in this case cover similar technology” while the defendant
 23 showed that one of the “significant patent agreements” appeared to be “radically different” because
 24 it covered “a broad range of inventions” and hundreds of patents. 887 F. Supp. 2d 999, 1023-24
 25 (S.D. Cal. 2011). Here, as discussed above, Finjan’s previous licenses are not “radically different”
 26 from the license that would result from the hypothetical negotiation because they cover the same
 27 technology, the same subject matter, and often the same patents. Moreover, Dr. Maness analyzes
 28 the licenses and their relevance to the hypothetical negotiation by delineating the similarities and

1 differences between those licenses and the hypothetical negotiation. (Mot., Ex. 6 (Maness Rpt.)
 2 ¶¶ 67–69, 74–76, 78–80, 85, 102, 105, 116, 118–20, 135–136.) PAN fails to articulate any specific
 3 difference Dr. Maness does not address. (Mot. at 24:28–25:11.) As the court in *DataQuill* required,
 4 Dr. Maness presents “evidence sufficient to allow the jury to weigh the economic value of the
 5 patented feature against the economic value of the features and services covered by the license
 6 agreement[s],” and the Court should allow his opinion. *DataQuill*, 887 F.Supp.2d at 1023–24.

7 **V. CONCLUSION**

8 PAN’s challenges against Finjan’s experts are legally unsupported, factually unsupported,
 9 go to the weight of the testimony, or all three. Based on the foregoing, Finjan requests the Court
 10 deny PAN’s Motion to Exclude Testimony of Drs. Keromytis and Maness.

11

12 Dated: October 2, 2024

Respectfully Submitted,

13

/s/ Tyler R. Train

14

Juanita R. Brooks (CA SBN 75934)
 brooks@fr.com

15

Roger A. Denning (CA SBN 228998)
 denning@fr.com

16

Frank J. Albert (CA SBN 247741)
 albert@fr.com

17

Jared A. Smith (CA SBN 306576)
 jasmith@fr.com

18

Tyler R. Train (CA SBN 318998)
 train@fr.com

19

Elliot N. Scher (CA SBN 343705)
 scher@fr.com

20

FISH & RICHARDSON P.C.
 12860 El Camino Real, Suite 400
 San Diego, CA 92130
 Telephone: (858) 678-5070 / Fax: (858) 678-5099

21

Aamir Kazi (*Pro Hac Vice*)
 kazi@fr.com

22

Lawrence Jarvis (*Pro Hac Vice*)
 jarvis@fr.com

23

FISH & RICHARDSON P.C.
 1180 Peachtree Street NE, 21st floor
 Atlanta, GA 30309
 Telephone: (404) 892-5005 / Fax: (404) 892-5002

24

25

26

27

28

1 Susan E. Morrison (*Pro Hac Vice*)
2 morrison@fr.com
3 FISH & RICHARDSON P.C.
4 222 Delaware Ave., 17th Floor
5 P.O. Box 1114
6 Wilmington, DE 19801
7 Telephone: (302) 652-5070 / Fax: (302) 652-0607

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Plaintiff FINJAN LLC